No. 15889

See also Vol. 3083

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE DEUTSCH COMPANY,
Respondent.

THE DEUTSCH COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On the Petition for Rehearing to Set Aside Orders of the National Labor Relations Board.

PETITION OF THE DEUTSCH COMPANY FOR REHEARING.

and

BRIEF OF THE DEUTSCH COMPANY.

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No. 15889

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PETITION OF THE DEUTSCH COMPANY FOR REHEARING.

To the Honorable Chief Justice of the United States Court of Appeals for the Ninth Circuit and the Associate Justices Thereof, and to the Honorables James A. Fee, Richard H. Chambers, Stanley N. Barnes, Circuit Judges of the Said Court of Appeals:

The Deutsch Company, Petitioner and Respondent above named, respectfully petitions this Honorable Court for a rehearing on its answer to the Petition for Enforcement of an Order of the National Labor Relations Board and its Petition to Modify and Set Aside Orders of the National Labor Relations Board, and in support of this Petition represents to the Court as follows:

I.

The Deutsch Company, Petitioner-Respondent, reserves its argued position as to each of the points in its Answer

to the Petition for Enforcement and its Petition to modify and set aside the Orders of the National Labor Relations Board and to its Brief in Support thereof, but in this Petition addresses itself solely to those features of the decision and opinion wherein it believes the Honorable Court may be convinced its result is based upon:

(1) Failure to consider controlling statutes, decisions and legal principles;

(2) Overlooking relevant and material facts in the record that the National Labor Relations Board failed and refused to take testimony upon relevant and material facts;

(3) Overlooking the material question whether the Board acted arbitrarily in making its orders, without taking any testimony or receiving any evidence on material issues.

(4) The opinion is in conflict with the opinion of the Court of Appeals for the Seventh Circuit in *National Labor Relations Board v. Plankinton Packing Company,* No. 12419, April 16, 1959, 43 L. R. R. M. 2858;

(5) The case is of great precedent potential.

II.

The features of the decision and opinion of the Honorable Court upon which the foregoing grounds for this Petition are based consist of:

(1) The opinion and decision did not decide the legality of the orders of the National Labor Relations Board which carried with them an implied ruling that where the elective officers of the Union have abandoned their offices in the Union and non-elected persons of a separate Union have usurped the powers and

functions of the officers and acted without having authority and without complying with the Constitution and By-Laws of the Union, and a separate Union for which they purport to act has never been certified as the exclusive bargaining agent of any of The Deutsch Company's employees, there is a schism situation whereby the Union purportedly certified to represent the employees has no agents or officers and the Union which claims to represent the employees does not meet the description of the exclusive bargaining representative set forth in the Certification of Representations.

(2) The decision and opinion did not decide whether the National Labor Relations Board abused its discretion and acted contrary to the National Labor Relations Act, the Administrative Procedure Act and the Fifth Amendment to the United States Constitution in refusing to hold a hearing and take testimony on the facts involving the schism situation and involving the conflict caused by claims of two union groups to represent the employees of The Deutsch Company and by denying summarily the Motion for (1) Rehearing and Reconsideration (2) An Order Setting Aside the Decision and Direction of Election and (3) An Order Setting Aside Certification of Representatives.

(3) The decision and opinion did not decide whether the National Labor Relations Board abused its discretion and acted arbitrarily and contrary to the National Labor Relations Act, the Administrative Procedures Act and the United States Constitution in failing and refusing to consider or take evidence with regard to the desires of the employees to be

represented by a Union as evidenced by the secret consent election held on the agreement of the employer, the Union, and the Union members.

(4) The decision and opinion failed to decide whether the National Labor Relations Board acted arbitrarily and in abuse of the discretion conferred upon it and contrary to the National Labor Relations Act, the Administrative Procedure Act and the United States Constitution in designating as the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act a multi-plant company unit, and in rejecting the offer of evidence at the hearing on the Complaint and refusing to take evidence upon a Petition for Rehearing on the issues at the Representation hearing on the following facts:

(a) The Deutsch Company had two plants geographically separated which manufactured different products;

(b) It sold its products under separate sales departments, out of separate catalogs;

(c) Its plants were in separate cities and operated under separate autonomous plant managers, each having authority to hire and fire the employees under the respective separate plant managers, each being responsible only to the Board of Directors of the corporation;

(d) Its separate plants had different rates of pay, working conditions, and hours of work;

(e) The skill of the employees at each of the plants differed, the employees in one plant being highly skilled machinists, and the employees in the other being unskilled assemblers and packagers;

(f) The classification of the workers by sex was predominently male in one plant, and almost entirely female at the other;

(g) The employer had no uniform personnel policy for both of its plants;

(h) There was no interchange of personnel between the plants nor any uniform seniority list between the plants;

(i) The majority of the production and maintenance employees at one plant by secret ballot election expressed their wish not to be represented by the Union while it was and is believed by both the Union and the employer that a majority of the production and maintenance employees at the other plant did desire representation by the Union.

III.

The Honorable Court of Appeals for the Ninth Circuit should decide the foregoing issues, any one of which should dispose this Honorable Court either to set aside and deny enforcement of the Orders of the National Labor Relations Board or to remand to the National Labor Relations Board for a hearing by it and a determination of the factual question posed by these issues which the National Labor Relations Board arbitrarily and in the abuse if its discretion failed and refused to consider or on which the National Labor Relations Board failed to take any evidence.

IV.

That these issues which the Honorable Court of Appeals for the Ninth Circuit did not decide should be decided as a matter of law in determining whether or not the employer has failed to bargain with the Union or has violated

Section 8(a) and subsections 1 and 5 of the National Labor Relations Act and whether or not in conducting its hearings and makings its orders the National Labor Relations Board has violated the provisions of the National Labor Relations Act and the Administrative Procedure Act and has deprived the employer and his employees of due process of law contrary to the provisions of the Fifth Amendment to the United States Constitution.

Conclusion.

For the foregoing reasons it is respectfully submitted that this Honorable Court should grant this Petition for Rehearing upon the issues set forth herein.

Respectfully submitted,

COYLE & COOPER,
Attorneys for Petitioner Respondent,
The Deutsch Company.

LEON M. COOPER,
Of Counsel.

State of California)
) ss.
County of Los Angeles)

Leon M. Cooper, being first duly sworn, on oath, certifies and says:

That he is one of the attorneys for The Deutsch Company, Petitioner-Respondent in this cause; that he makes this certification in compliance with Rule 23 of the Rules of this Court; that in his judgment the within foregoing Petition for Rehearing is well founded and is not interposed for delay.

LEON M. COOPER.

Subscribed and sworn to before me this 5th day of May, 1959, at Los Angeles, California.

MILLICENT H. SUZUKI,
Notary Public in and for said County and State.

No. 15889

IN THE

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FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

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vs.

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

On the Petition for Rehearing to Set Aside Orders of the National Labor Relations Board.

BRIEF OF THE DEUTSCH COMPANY.

To the Honorable Chief Justice of the United States Court of Appeals for the Ninth Circuit and the Associate Justices Thereof, and to the Honorables James A. Fee, Richard H. Chambers, Stanley N. Barnes, Circuit Judges of the Said Court of Appeals:

The Petitioner, The Deutsch Company, respectfully praying that its Petition for Re-hearing on its Petition to Modify and to Set Aside the Orders of the National Labor Relations Board should be granted, comes now, and in support thereof, respectfully submits:

Statement of Proceedings and Jurisdiction.

This case is before this Honorable Court upon the Petition of the National Labor Relations Board for Enforcement of its Order [Tr. pp. 105-107] and the Answer of Petitioner-Respondent, The Deutsch Company, to the said Petition for Enforcement [Tr. pp. 125-142] and upon the Petition of The Deutsch Company to Modify and Set Aside the Orders of the Nation Labor Relations Board [Tr. pp. 108-125].

On April 8, 1959, this Honorable Court made its decree enforcing the Order of the National Labor Relations Board and pursuant to its Rule 26 ordered that its Mandate be stayed for thirty days unless the Petition for Rehearing of the cause be filed meantime.

The Petition of the National Labor Relations Board was filed in the above-named Honorable Court to enforce its order that The Deutsch Company cease and desist from refusing to bargain collectively with the United Industrial Workers' Local 976, AIW-AFL-CIO and cease and desist from interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Industrial Workers Local 976, AIW-AFL-CIO or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activities or other mutual aid or protection or to refrain from any activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act.

The Board had held a representation hearing upon which the Board issued a Decision and Direction of Elec-

tion and Certification of Representatives and Orders in Representation Case No. 21-RC-4365 [Tr. pp. 211, 342-344, 253, 352, 333, 449-451]. Thereafter, the United Industrial Workers' Local 976, filed a charge alleging that The Deutsch Company had been and was engaging in violations of Section 8(a), subsections (1) and (5) of the National Labor Relations Act. After a hearing, the Honorable Trial Examiner made his Intermediate Report and Recommended Order [Tr. pp. 29-79].

The case was transferred to the National Labor Relations Board on February 19, 1957 and on September 4, 1957 the Board made its Decision and Order, which it now seeks to enforce [Tr. pp. 80-85].

The jurisdiction of the Board arises because The Deutsch Company is engaged in interstate commerce. This Honorable Court has jurisdiction to review the said orders of the Board under and pursuant to National Labor Relations Act, Section 10, subsections (e) and (f) as amended (29 U. S. C. A., Sec. 160, subsecs. (e) and (f)).

This Honorable Court has jurisdiction to re-hear the Petition to Modify and Set Aside the Order of the National Labor Relations Board under and pursuant to its Rule 23.

Statement of Facts.

1. *The Refusal of the Board to Receive Evidence on the Employees' Sentiment as Established by the Consent Election.*

In the hearing on the charges of violations of Section 8(a), subsections (1) and (5) of the Act, The Deutsch Company offered to prove that since the time of the Representation Hearing the sentiment of the employees for

representation by the Union in one of the plants was tested by a Consent Election under an agreement entered into between the Union, all the members of the Union, and The Deutsch Company [Tr. pp. 307-320].

The Union itself had recognized the substantial differences between the Employees at The Deutsch Company's Avalon plant and those at its Regent Street plant [Tr. pp. 160-162]. The Board had also taken note of these distinctions prior to the agreement when, without any evidence or basis for evidence of the sentiment of the employees, it recognized in its Certification of Representatives that either a single-plant or a multi-plant unit would be appropriate for the purposes of collective bargaining for the Employees of The Deutsch Company [Tr. pp. 211, 338-341].

After the conclusion of the Representation Hearing the sentiment of the employees at the Avalon plant was discovered to be substantially against representation by the Union. Notwithstanding, the Union charged The Deutsch Company with unfair labor practices for refusing to bargain, although there was uncontradicted newly discovered evidence which the Board should have heard in order to ascertain whether or not its prior decision in the Representation Hearing on the appropriateness of the unit was valid. These facts in connection with other relevant facts with regard to the appropriateness of the unit for the purposes of collective bargaining were specifically rejected by the Honorable Trial Examiner, although an offer of proof was made that there was newly discovered evidence and that there was evidence of a change of circumstances with regard to the question of the appropriateness of the unit which should have been heard by the Board in order to determine whether or not there was a valid

basis for the charges of a violation of Section 8(a), subsections (1) and (5) of the Act [Tr. pp. 316-317]. This the Board refused to do. The Board in refusing to take the evidence acted arbitrarily and in the abuse of the discretion conferred upon it.

2. *The Failure and Refusal of the Board to Hear Evidence With Regard to the Elements and Factors Determining the Appropriateness of the Unit for Purposes of Collective Bargaining.*

In the Representation Hearing the greatest amount of the time was taken up with the determination of whether or not certain persons were supervisors.

The little evidence with regard to the appropriateness of the unit for the purposes of collective bargaining which was heard at the Representation Hearing included the fact that there were two separate plants for the Company in different cities having different working hours and different shifts. There was further testimony that there was no history of interchangeability of the Employees between the two plants, each of which had separate supervision.

Following the taking of the testimony at the Representation Hearing, the Union was willing to stipulate to a separate plant unit appropriate for the purposes of collective bargaining [Tr. pp. 189-195]. One of the intervening unions, however, which received no votes in any election, felt that the appropriate unit should be the entire employer unit. The Hearing Officer at the Representation Hearing believed that if the parties all should agree that there were two units the Board would accept it.

The Union's organzational procedure, as stated at the Representation Hearing, was only to apply for the Avalon

plant and treat the Regent Street plant as an entirely separate organizational problem [Tr. pp. 196-197].

In its Decision and Direction of election [Tr. pp. 338-341], the Board stated and found that the single plant unit would have been appropriate here, although it did conclude that the multi-plant unit was appropriate. However, the Decision and Direction of Election erroneously stated that the two plants were centrally administered, functionally integrated, had a uniform personnel policy and that the Employees at the two plants have similar skills. Out of these facts and others the Board concluded that a single unit at both plants would be appropriate.

If these erroneous impressions had been called to the attention of the Board, it would have satisfied the Board that the multi-plant unit was inappropriate and single-plant unit was the appropriate unit for the purposes of collective bargaining. The Deutsch Company attempted to correct these errors and to bring other relevant and material facts to the attention of the Board by a Petition for Rehearing and Reconsideration by the Board of its Decision and Direction of Election, etc. [Tr. pp. 425-446]. This Petition was denied without any hearing on the facts or arguments on the law. The Petition for Rehearing and Reconsideration had been pending, and the notice of the decision denying the Petition was not given to The Deutsch Company until after the Board had conducted its election.

It was an abuse of discretion by the Board and an arbitrary act by the Board to deny summarily the Petition for Rehearing and Reconsideration on these allegations without taking any testimony on the facts offered to the Board. It was this basic error which caused the difficulty which the Union, its members and the Employer attempted

to resolve by their own agreement for a consent election in November.

At the time of the hearing on the 8(a)(1) and 8(a)(5) charges, The Deutsch Company again offered evidence of the additional facts to correct the errors of the Representation Hearing and the newly discovered evidence with regard to the sentiment of the employees against representation by the Union at the Avalon plant. This conclusively establishes that the single-plant unit is appropriate. Again, the Trial Examiner and the Board rejected the offer of proof and made the order without hearing any of the facts or the offered testimony [Tr. pp. 307-320]. This was an arbitrary act of the Board and the abuse of its discretion, because it made its orders without giving any consideration to relevant and material facts which should have determined its action.

3. *The Refusal of the Board to Hear Any Facts Newly Discovered Involving a Change of Circumstances Because of the Schism in the Union.*

Following the hearing on the 8(a)(1) and 8(a)(5) charges the Honorable Trial Examiner made his Intermediate Report and Recommended Order. On September 4, 1957 the National Labor Relations Board issued its Decision and Order adopting the findings and conclusions and recommendations of the Trial Examiner.

On or about September 6, 1957 demands were made by one Peter Lentini as secretary of the United Industrial Workers' Local 976 AIW-AFL-CIO demanding that The Deutsch Company commence bargaining with Local 976 through him. At the same time, certain persons, including Carl W. Griepentrog, Frank Evans, and Bert Bergbackinger, claiming to be, respectively, the President, an

Executive Board Member, and a Vice-President of the International Union, Allied Industrial Workers of America, affiliated with AFL-CIO demanded that The Deutsch Company bargain with them as the agent and exclusive representative of The Deutsch Company's employees pursuant to the orders of the National Labor Relations Board. The company had been informed that the latter persons were not elected officials of Local 976, but that they had usurped the powers and functions of the officials of the Union and are acting without the authority of the Union and without complying with the constitution or by-laws of the Union. The International Union which they represent had never been certified as the exclusive representative of the employees of The Deutsch Company. The Deutsch Company was informed that the existing officers of Local 976 had abandoned and discontinued their offices and functions and that it had been dissolved and was no longer in existence by reason of the schism and certain charges and litigation pending between the Local and the International. The conflicting demands for bargaining made it impossible for The Deutsch Company to comply with any order even if the order had been a lawful one.

The Deutsch Company brought these matters to the attention of the Board by a motion for Rehearing and Reconsideration of its Decision and Order, etc. [Tr. pp. 97-101].

The Board summarily denied the Motion for Reconsideration and Rehearing based upon these newly discovered facts and change of circumstances without taking any evidence thereon [Tr. pp. 103-104]. It was an abuse of its discretion and an arbitrary act of the Board to deny this Motion without a hearing and without taking any evidence on any of the facts alleged therein.

Specification of Errors.

1. Failure to consider controlling statutes, decisions and legal principles;

2. Overlooking relevant and material facts in the record that the National Labor Relations Board failed and refused to take testimony upon relevant and material facts.

3. Overlooking the material question whether the Board acted arbitrarily in making its orders, without taking any testimony or receiving any evidence on material issues.

4. The opinion is in conflict with the opinion of the Court of Appeals for the Seventh Circuit in *National Labor Relations Board v. Plankinton Packing Company,* No. 12419, April 16, 1959, 43 L. R. R. M. 2858.

Summary of Argument.

The features of the decision and opinion of the Honorable Court upon which the foregoing grounds for this Petition are based consist of:

(1) The opinion and decision did not decide the legality of the orders of the National Labor Relations Board which carried with them an implied ruling that where the elective officers of the Union have abandoned their offices in the Union and non-elected persons of a separate Union have usurped the powers and functions of the officers and acted without having authority and without complying with the Constitution and By-Laws of the Union, and a separate Union for which they purport to act has never been certified as the exclusive bargaining agent of any of The Deutsch Company's employees, there is a schism situation whereby the Union purportedly certified to

represent the employees has no agents or officers and the Union which claims to represent the employees does not meet the description of the exclusive bargaining representative set forth in the Certification of Representations.

(2) The decision and opinion did not decide whether the National Labor Relations Board abused its discretion and acted contrary to the National Labor Relations Act, the Administrative Procedure Act and the Fifth Amendment to the United States Constitution in refusing to hold a hearing and take testimony on the facts involving the schism situation and involving the conflict caused by claims of two union groups to represent the employees of The Deutsch Company and by denying summarily the Motion for (1) Rehearing and Reconsideration, (2) An Order Setting Aside the Decision and Direction of Election, and (3) An Order Setting Aside Certification of Representatives.

(3) The decision and opinion did not decide whether the National Labor Relations Board abused its discretion and acted arbitrarily and contrary to the National Labor Relations Act, the Administrative Procedures Act and the United States Constitution in failing and refusing to consider or take evidence with regard to the desires of the employees to be represented by a Union as evidenced by the secret consent election held on the agreement of the employer, the Union, and the Union members.

(4) The decision and opinion failed to decide whether the National Labor Relations Board acted arbitrarily and in abuse of the discretion conferred upon it and contrary to the National Labor Rela-

tions Act, the Administrative Procedure Act and the United States Constitution in designating as the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act a multi-plant company unit, and in rejecting the offer of evidence at the hearing on the Complaint and refusing to take evidence upon a Petition for Rehearing on the issues at the Representation hearing on the following facts:

(a) The Deutsch Company had two plants geographically separated which manufactured different products;

(b) It sold its products under separate sales departments, out of separate catalogs;

(c) Its plants were in separate cities and operated under separate autonomous plant managers, each having authority to hire and fire the employees under the respective separate plant managers, each being responsible only to the Board of Directors of the corporation;

(d) Its separate plants had different rates of pay, working conditions, and hours of work;

(e) The skill of the employees at each of the plants differed, the employees in one plant being highly skilled machinists, and the employees in the other being unskilled assemblers and packagers;

(f) The classification of the workers by sex was predominantly male in one plant, and almost entirely female at the other;

(g) The employer had no uniform personnel policy for both of its plants;

(h) There was no interchange of personnel between the plants nor any uniform seniority list between the plants;

(i) The majority of the production and maintenance employees at one plant by secret ballot election expressed their wish not to be represented by the Union while it was and is believed by both the Union and the employer that a majority of the production and maintenance employees at the other plant did desire representation by the Union.

Introduction.

The argument made in the Brief of The Deutsch Company in support of its Petition to Modify and Set Aside the Order of the National Labor Relations Board is incorporated herein by reference. The Points and Authorities set forth therein will not be reiterated here. The arguments there made were in some respects resolved by the decision and opinion of this Honorable Court.

However, in its opinion, the Honorable Court did not consider the essential factors in this case turning on whether the National Labor Relations Board acted arbitrarily and in the abuse of its discretion in refusing to take evidence on relevant and material facts throughout its determination of the charges brought against The Deutsch Company in various hearings.

Initially, the National Labor Relations Board summarily and without taking any testimony denied The Deutsch Company's Petition for Rehearing and Reconsideration of Its Decision and Direction of Election, after the Representation Hearing. Here, additional facts could have been introduced which would have corrected erroneous findings

and reached a conclusion agreeable to both the Union and The Deutsch Company that the appropriate unit was the separate plant unit. The Board insisted on conducting an election without taking this vital evidence.

Subsequently, it was discovered that the sentiment among the employees at the Avalon plant was against representation by the Union. This, together with the other factors which pointed toward a separate plant unit as the appropriate unit, induced the Employer, the Union, and the Union Members to agree to hold a consent election to determine the sentiment of these employees for representation at Avalon. Such an election was conducted and the sentiment of the employees at the Avalon plant was conclusively established to be against representation by the Union.

Thereafter, at the time of the hearing upon the alleged charges for failure to bargain the Honorable Trial Examiner and the Board refused to take any of the evidence with regard to all of the facts with regard to the appropriateness of the unit including the sentiment of the employees to be represented by the Union. Again, it is contended that the Board acted arbitrarily and in abuse of its discretion in making its order that the Employer cease and desist from failing and refusing to bargain.

Finally, after the making of the order, new facts, newly discovered evidence and change of circumstances were brought to the attention of the Board by the Employer which was faced with a schism situation in the Union and conflicting demands for representation. Once more, the Board acting summarily and without taking any evidence denied the motion and proceeded to enforce the order. Again, the Board acted arbitrarily and in abuse of its dis-

cretion in failing to afford a fair and proper hearing to the Company.

Therefore, the Board has violated the express protection of a full and fair hearing afforded by the National Labor Relations Act and the Administrative Procedure Act, and the arbitrary rulings of the National Labor Relations Board and the abuse of the discretion conferred upon it in refusing to take evidence has resulted in denial of a fair hearing to The Deutsch Company contrary to the provisions of the Fifth Amendment of the United States Constitution.

The result has been to disenfranchise the employees of The Deutsch Company in their statutory right to choose their own bargaining representative under the provisions of the National Labor Relation Act.

For these reasons it is respectfully requested that this Petition for Rehearing should be granted by this Honorable Court.

ARGUMENT.

I.

The Honorable Court of Appeals for the Ninth Circuit Should Grant a Rehearing on the Petition of The Deutsch Company to Modify and Set Aside the Order of the National Labor Relations Board Because the Honorable Court Has Overlooked Points Made in Argument That the Board Acted Arbitrarily in Refusing to Take Evidence and Afford a Fair Hearing on Matters Relevant and Material to the Charges Made Against The Deutsch Company and Because the Decision of This Honorable Court Is in Conflict With Other Authorities, All of Which Would Bring About a Different Result.

The rules of the Court of Appeals for the Ninth Circuit afford an interested party the opportunity to petition the Honorable Court for a rehearing within thirty days after the Judgment.

> Rules of the United States Court of Appeals for the Ninth Circuit, Rule 23.

The purpose of a petition for rehearing is to direct the Court's attention to some material matter of law or fact which it may have overlooked in deciding the case, and which, had it been given consideration, would probably have brought about a different result.

> *National Labor Relations Board v. Brown & Root,* 206 F. 2d 73 (C. A. 8, 1953).

See:

> Louisell and Degnan, "Rehearing in American Appellate Courts," 44 Cal. L. Rev. 627, 632-641 (1956).

The opinion of this Honorable Court gave consideration to the questions of appropriateness of the two-plant unit, the irregularities of the Board-conducted election, the lack of the majority of the employees voting thereat, the validity of the consent election, the waiver by the union of its rights and the Company's good faith in bargaining. It is respectfully submitted that the Honorable Court did not consider the arbitrary manner in which the Board abused the discretion conferred upon it in refusing to take relevant and material testimony in making its decision. Although the Court did consider the Board's decision as to the appropriateness of the single plant unit and even noted that the Board could have found either way, this Honorable Court did not in its opinion touch upon the question whether or not the Board's determination was made in light of all of the evidence which was offered to it and which it rejected at the time of the representation hearing, prior to the Board-conducted election, at the time of the Board hearing, and subsequent thereto.

This Honorable Court in its opinion did not consider whether the newly discovered evidence and change of circumstances as shown by the private consent election were arbitrarily excluded from the Board's consideration in making its determination of the appropriate unit for collective bargaining and in deciding whether or not The Deutsch Company had violated sections 8(a)1 and 8(a)5 of the Act. Because no evidence was taken upon these matters which were relevant and material both on the representation question and on the unfair bargaining question, the Board's arbitrariness and abuse of discretion are established.

Finally, when newly discovered evidence and a change of circumstances involving a schism situation were brought

to the attention of the Board by a Motion for Rehearing and Reconsideration, and the Board summarily rejected the Motion without taking any evidence thereon, it is respectfully suggested that this Court should have given consideration in its opinion to the fact that the Board acted arbitrarily and in abuse of its discretion in failing to take evidence upon this matter vitally connected with its cease and desist order.

The National Labor Relations Act requires the employer to bargain with the representative of its employees subject to provisions of Section 9(a).

> National Labor Relations Act, Sec. 8(a)5; 29 U. S. C. A., Sec. 158(a)(5).

Section 9(a) defines the exclusive representative of the employees for purposes of collective bargaining as the representative in a unit appropriate for purposes of collective bargaining. In making the determination the Board shall consider whether or not unit appropriate for the purpose of collective bargaining assures to the employees the fullest freedom in exercising the right guaranteed under the National Labor Relations Act.

> National Labor Relations Act, Sec. 9(b); 29 U. S. C. A. Sec. 159(1).

These are the questions which underly whether or not a fair hearing was afforded to The Deutsch Company and its employees by the National Labor Relations Board. If they were not, the resultant administrative errors which caused the confusion recognized by both the Union and The Deutsch Company do explain the bargaining problems confronting The Deutsch Company. It is respectfully suggested that a rehearing by this Honorable Court will convince the Honorable Court of the fact that the Board

acted arbitrarily and in the abuse of the discretion conferred upon it, and contrary to the provisions of the National Labor Relation Act, the Administrative Procedure Act and in violation of the rights of The Deutsch Company and its employees under the Fifth Amendment to the United States Constitution.

II.

Before the Board Can Validly Order an Employer to Bargain With the Union or Charge the Employer for Refusal to Bargain in Violation of Sections 8(a)(1) and 8(a)5 of the Act, the Board Must Establish That the Employer Has Refused to Bargain With the Union on the Basis of the Unit Appropriate for Collective Bargaining Purposes.

If the unit is in fact inappropriate, the employer would violate the rights of his employees and the provisions of the National Labor Relations Act in bargaining with a purported representative in an inappropriate unit.

Endicott-Johnson Corp., 108 N. L. R. B. 88 (1954);

Goddard & Co., Inc., 105 N. L. R. B. 849 (1953).

Therefore, when the employer refuses to bargain even with the certified union which is not the representative of the employees in an appropriate unit, it is not a violation of Section 8(a)(5) of the Act.

Carson Pirre Scott & Co., 75 N. L. R. B. 1244 (1948).

It is not the intention of the Petitioner to reiterate the argument and the authorities establishing that a single-plant unit is the only appropriate unit for the purposes of collective bargaining for The Deutsch Company. These

matters were covered in detail on pages 38-45 of The Deutsch Company's Brief on the Petition to Modify and Set Aside the Order of the National Labor Relations Board filed in this Honorable Court.

However, recent decisions by the National Labor Relations Board are at a variance with its determination of the appropriateness of the unit in this case. It is respectfully requested, therefore, that this Honorable Court consider, in passing, these decisions; for, if the Board, in attempting to establish some sort of a standard, arbitrarily varies it, the Courts are inclined to consider the Board's action arbitrary. Some consideration to standards established by the Board must be given by the Board in its subsequent decision. Even though the customary practices of the Board may be left to a case-by-case application, an inherent inconsistency in the Board's decision proves arbitrariness.

> *National Labor Relations Board v. Plankinton Packing Co.*, 43 L. R. R. M. 2858 (C. A. 7, April 16, 1959).

In the recent decision of *In re Tele-computing Corp.*, 122 N. L. R. B. No. 81, 43 L. R. R. M. 1167 (Dec. 19, 1958), the Board held that a single-plant unit of an aircraft valve manufacturing company's production and maintenance employees is appropriate, notwithstanding a considerable degree of integration among the employees of various plants in the Los Angeles area. The employer had plants in Lynwood, Hollywood, Van Nuys, North Hollywood and Culver City, California. The Board had found that the unit appropriate was the single-plant unit, even though there was a considerable degree of functional and administrative integration between the various plants involved. On the other hand, the Board also noted the

geographical separation of the plants, the absence of employee interchange, the degree of local plant autonomy, the absence of a bargaining history, the fact that no labor organization sought a broader unit, and with respect to the Van Nuys plant, a difference in products manufactured.

The similarity between the *Tele-Computing Corp.* decision and The Deutsch Company facts is striking. All of the elements in that decision exist here. The Board, therefore, in the same locality and the same industry has shown patent inconsistency in its rulings on the appropriateness of the unit. It is the inconsistency between the positions taken by the Board in the present case and in the *Tele-Computing* case, which is respectfully called to the attention of this Honorable Court. This inconsistency proves the Board's arbitrariness here.

As a rule, this Honorable Court should accept the unit determination of the National Labor Relations Board, unless a review of the entire record shows that the Board has acted arbitrarily or without rational cause.

N. L. R. B. v. Plankinton Packing Co., supra;

N. L. R. B. v. Glen Raven Knitting Mills, 235 F. 2d 413 (C. A. 4, 1956).

Thus, this Honorable Court should not only consider, as it did, the inconsistency of the Board's decisions on the appropriateness of the unit in similar cases, but whether or not the Board afforded a full and fair hearing to all of the parties concerned by taking all of the relevant and material evidence offered in connection with its decision. If it did not do so, then clearly the Board acted arbitrarily, and this Honorable Court should afford a rehearing on the matter before it to consider this issue.

III.

The National Labor Relations Board Acted Arbitrarily, and in Abuse of the Discretion Conferred Upon It, Contrary to the Provisions to the National Labor Relations Act, the Administrative Procedure Act, and the Fifth Amendment to the United States Constitution in Failing and Refusing to Receive Evidence With Regard to Relevant and Material Facts on the Appropriateness of the Unit for Purposes of Collective Bargaining, During, and After, the Representation Hearing, and Hearings on the Unfair Labor Charges, and This Honorable Court, Therefore, Should Remand the Matter to the Board to Take This Evidence.

The National Labor Relations Board first refused to hear the significant and relevant evidence as to factors determining the appropriateness of the unit immediately following its Decision and Direction of Election. It indicated in its Decision and Direction of Election that either the single-plant or multi-plant unit might be appropriate for the purposes of collective bargaining.

When the Board was thereafter confronted with a Petition for Reconsideration and Rehearing which offered additional evidence, not theretofore adduced, on the question of appropriateness of the unit, the Board summarily denied the petition and refused to consider the additional evidence. That began the confusion which resulted in the Union, its members and the Employer making an agreement for a consent election to determine the sentiment of the employees since it was felt that the Board-conducted election has been totally inadequate even though it may have complied with certain legal formalities.

Subsequently, upon the hearing of the 8(a)(1) and 8(a)(5) charges, evidence as to the proper and appropriate unit for the purposes of collective bargaining was

again offered together with newly discovered evidence in regard to the sentiment of the employees at the Avalon plant. This testimony was again rejected by the Board, and, therefore, did not play a part in the decision of the Honorable Trial Examiner or the Board.

The Court of Appeals for the Second Circuit found that it was reversible error for a trial examiner to refuse to require a union witness to answer certain questions on cross-examination even though the Board contended that the Company was not harmed because the examiner and the Board accepted the testimony of the Company witnesses about the subject involved. However, the Board of Appeals, Judge Frank writing the opinion, indicated that it was reversible error for this testimony to be excluded since the Court could not determine what the testimony might have disclosed on the relevant issues involved. Thus, the case was remanded to the Board with directions to reopen the hearing to permit the examination of the witness. The Board would then reconsider the findings in light of this testimony.

Daily Review Corp. v. N. L. R. B., 192 F. 2d 269 (C. A. 2, 1951).

The Board has contended that even if this evidence is admitted it would make no difference because the order of the Board would be the same. However, the Courts of Appeal in reviewing the decisions of the National Labor Relations Board have consistently rejected this argument. They have found the rejection of relevant and material evidence to be a denial of due process contrary to the provisions of the Fifth Amendment to the United States Constitution.

In *Donnelly Garment Co. v. N. L. R. B.*, 123 F. 2d 215 (C. C. A. 8, 1941), Judge Sanborn, writing the opinion, stated at page 224:

> "That a refusal by an administrative agency such as the National Labor Relations Board, to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. . . . That the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point. The truth is that a controversy tried before a Court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. See National Labor Relations Board v. Thompson Products, Inc., 6 Cir., 97 F. 2d 13, 15; Foote Bros. Gear & Mach. Corp. v. National Labor Relations Board, 7 Cir., 114 F. 2d 611, 621."

This well-established rule has been consistently followed. In *National Labor Relations Board v. Burns & Gillespie,* 207 F. 2d 434 (C. A. 8, 1953), the Court approved the *Donnelly Garment Co.* opinion and again found a deprivation of due process in the proceedings before the Board since the proffered evidence was competent and material and should have been received and considered. The fact that the Board contended that, even though the exclusion was erroneous, it was harmless and should be ignored since it would not change the result, did not derrogate from the deprivation of due process.

The National Labor Relations Board is not permitted either by the National Labor Relations Act, or the Admin-

istrative Procedure Act to ignore material, uncontradicted facts.

National Labor Relations Board v. Cleveland Trust Co., 214 F. 2d 95 (C. A. 6, 1954).

The Administrative Procedure Act provides that . . .

"No sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and is supported by and is in accordance with the reliable, probative and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Administrative Procedure Act, Sec. 7(c), 5 U. S. C. A. 1006(c).

The Labor Management Relations Act requires the Board to make its decision upon the preponderance of the testimony taken.

Labor Management Relations Act, Sec. 10(c), 29 U. S. C. A. 160(c).

When these matters are reviewed, the findings of the Board with respect to questions of fact must be supported by substantial evidence on the record considered as a whole; and the Court may order the taking of additional evidence if it is satisfied that it is material and that there are reasonable grounds for the failure to adduce such evidence in the hearings of the Board or the trial examiner.

Labor Management Relations Act, Sec. 10(e), 29 U. S. C. A. 160(e).

The provisions of the Administrative Procedure Act provide that the reviewing court in deciding relevant questions of law, interpreting constitutional and statutory provisions, and determining the meaning or applicability of the terms of any agency action should hold unlawful and set aside agency actions, findings and conclusions found to be:

(1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(2) Contrary to constitutional right, power, privilege or immunity;

(3) In excess of statutory jurisdiction, authority or limitations, or short of statutory rights;

(4) Without observance of procedure required by law;

(5) Unsupported by substantial evidence. . . . Administrative Procedure Act, Section 10(e), 5 U. S. C. A. Sec. 1009(e).

The United States Supreme Court has been scrupulous in protecting against the deprivation of due process in violation of loose administrative procedure which has resulted in orders and decisions upon less than a complete record of material facts.

Universal Camera Corp. v. N. L. R. B., 340 U. S. 474 (1951).

This Honorable Court itself has remanded to the National Labor Relations Board cases with directions to consider the matters on the merits where a full consideration on the merit was not afforded by the Board.

National Labor Relations Board v. Olaa Sugar Company, 242 F. 2d 714 (C. A. 9, 1957);

National Labor Relations Board v. International Woodworkers of America, 238 F. 2d 378 (C. A. 9, 1956).

The Petition for Enforcement here is based upon alleged violations of Sections 8(a)(1) and 8(a)(5) of the Act, but a determination of this question involves, preliminary, the decision as to what is the appropriate unit for the purposes of collective bargaining, designated or selected by the majority of the employees. This decision is usually made after a representation hearing and the decision and direction of election following thereon. Here, all of the relevant evidence was not adduced at that hearing. The Petition for Rehearing and Reconsideration to adduce additional relevant and material evidence was summarily denied. The Union, its members and the Employer then attempted to resolve the confusion generated by the administrative, statutory and constitutional error of the Board. When, thereafter, a hearing on unfair labor charges was had, the evidence was again summarily denied and the evidence of the sentiment of the employees, newly discovered, which was also relevant and material, was rejected. The order of the Board, therefore, was not made upon a full hearing of the relevant and material evidence. The provisions of the Administrative Procedure Act and the National Labor Relations Act were flagrantly violated. The Board made its decisions arbitrarily and in abuse of the discretion conferred upon it. Since a fair hearing was denied to The Deutsch Company and its employees, due process of law guaranteed by the Fifth Amendment of the Constitution of the United States was denied them. The remedy available to them pursuant to the Act is for this Honorable Court to remand the case to the Board for the taking of such additional evidence as may be necessary and the modifying of the findings by reason of the evidence so taken and filed and thereafter filing its recommendations for the modification or setting aside of the Board's original order.

IV.

The National Labor Relations Board Acted Arbitrarily and in the Abuse of the Discretion Conferred Upon It Contrary to the Provisions of the National Labor Relations Act and the Administrative Procedure Act and in Violation of the Rights of The Deutsch Company and Its Employees Under the Fifth Amendment to the United States Constitution in Refusing to Take Evidence on the Schism Situation in the Union Which Occurred After the Conclusion of the Hearing by the Board.

After the National Labor Relations Board made its decision and issued its cease and desist order, a schism occurred in the Union. The officers of the Union were ousted, and their activities were seriously called into question. Litigation was commenced against some of them. However, both those officers and other individuals who were not officers or delegated agents of the Union demanded that The Deutsch Company bargain with them as the representative of The Deutsch Company employees. These other persons were officers of the Allied Industrial Workers Union of America, AFL-CIO. It appeared from the facts that these other persons had usurped the functions of Local 976 which had been abandoned and dissolved. The Board has denied there was such dissolution or schism. It has not, however, taken any evidence on the issue and has only made a summary denial of the motion of The Deutsch Company for a rehearing and reconsideration on those facts.

It is clear that the employees of The Deutsch Company never voted for the Allied Industrial Workers Union of America, AFL-CIO, as their representative. On the other hand, Local 976 which was certified has apparently been dissolved. Thus, when there is an attempt to charge The

Deutsch Company with a violation of the National Labor Relations Act in refusing to bargain collectively with the representatives of its employees, it is necessary to consider, initially, who those representatives are. Under Section 9(a) of the Labor Management Relations Act they are the representatives designated or selected for the purposes of collective bargaining by the majority of the employees. Section 7 of the Act gives the employees the right to form, join or assist labor organizations and to bargain collectively through representatives of their own choosing. Thus, it is relevant and material that the representative be a representative within the meaning of the Act. It is clearly not the case here.

At any rate, the facts with regard to whether or not there is a schism situation have never been fully examined. They must be examined by the Board and the Board must determine the substance of the situation in order to ascertain whether or not the schism in the Union has removed from the employees their basic statutory right to express their choice.

> *Dickey v. N. L. R. B.*, 217 F. 2d 652 (C. A. 6, 1954).

The essence, therefore, of the Board's arbitrary act is that it has failed and refused to receive evidence on the situation and to examine the facts and to determine the substance of the situation.

We will not cite here the arguments and authorities made with regard to the deprivation of due process, arbitrariness, abuse of discretion and violation of the law and the Constitution which we have heretofore made in this brief. Suffice it to say, that the same authority is applicable in connection with the failure to take evidence on the

schism situation as with the failure to take evidence regarding the appropriateness of the unit for purposes of collective bargaining.

It is significant to note that where circumstances have occurred after the Board's order has been issued which may affect the propriety of the enforcement of the order, the reviewing Court has discretion to decide the matter or to remand the matter to the Board for further consideration.

National Labor Relations Board v. Jones & Laughlin, 331 U. S. 416, 427 (1947).

National Labor Relations Act, Sec. 10(e), 29 U. S. C. A. 160(e).

Thus, where the record fails to show a determination of material factors in determining a vital issue on a petition for enforcement, the Court of Appeal may remand the case to the Board in order to have answers to questions which may have a material bearing upon the proper determination of the issues presented.

National Labor Relations Board v. Mid-Co Gasoline Co., 172 F. 2d 874 (C. A. 5, 1949);

National Labor Relations Board v. Cambria Clay Products Co., 215 F. 2d 48 (C. A. 6, 1954).

It is significant to note that even the National Labor Relations Board in its own procedure does not hesitate to reopen a matter for the taking of additional testimony when the question of the affiliation of the members of the representative union is involved. This is particularly true where there is a highly skilled unit such as machinists seeking separate representation.

In re Standard Forgings Corp., 29 N. L. R. B. 290 (1941).

In any event, because these relevant facts occurred subsequent to the Board's decision and testimony thereon was summarily rejected by the Board and because in any event a fair hearing requires the taking of testimony in regard to these facts, it is respectfully submitted that the Board has abused its discretion and acted arbitrarily in violation of both the statutory protections and the Constitutional rights afforded The Deutsch Company and its employees.

Conclusion.

It is respectfully suggested that the opinion of this Honorable Court did not give consideration to the arbitrary acts and the decisions and rulings of the Board in abusing the discretion conferred upon it, contrary to the provisions of the Administrative Procedure Act, the National Labor Relations Act and the Constitution of the United States.

It is for this reason that the significant elements of the charges have not fully been heard by the Board in making its order. This Honorable Court should, therefore, grant a rehearing upon this matter in order to hear and determine these issues and remand the case for the taking of additional evidence.

Respectfully submitted,

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